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IN THE

Supreme Court of the United States

No. 599

October Term, 1965

FRANK CIOFALO,

Petitioner,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK OR TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT

BRIEF AND APPENDIX FOR RESPONDENT IN OPPOSITION

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Respondent
The Capitol
Albany, New York 12224

RUTH KESSLER TOCH
Assistant Solicitor General

ROBERT L. HARRISON
Assistant Attorney General

of Counsel

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the New York Supreme Court, Appellate Division, Third Department (Appendix A hereto) is reported at 23 A. D. 2d 926, 258 N. Y. S. 2d 881. The New York Court of Appeals, in denying leave to appeal (Appendix B hereto), rendered no opinion.

Jurisdiction

While the jurisdiction of this Court is properly invoked by petitioner under 28 U. S. C., § 1257(3), since he is claiming rights, privileges and immunities under the Consti-

tution of the United States, it is essential to the jurisdiction of this Court that the federal questions which petitioner seeks to have reviewed were timely and properly raised in the courts below. Here, as petitioner concedes at page 3 of his Petition, the claim that he has been denied the equal protection of the laws under the 14th Amendment was not raised at any time in the proceedings below. For this reason petitioner is precluded from raising his equal protection claim in this Court. *Whitney* v. *California,* 274 U. S. 357, 362-63 (1927).

With respect to the claim that petitioner has been denied the right to counsel under the Sixth Amendment, it is submitted that petitioner has failed to show, as required by Rule 23(1)(f), the manner and method, with specific reference to the Record, in which this claim was timely and properly raised so as to give this Court jurisdiction; nor could he, since this claim was never properly raised in the proceedings below. A reading of the papers which petitioner has filed as the Record in this case (see footnote p. 2 of Petition) will completely bear this out. And even if pages 8-15 of Petitioner's Brief in the Appellate Division (see p. 16 of Petition) may be considered in determining whether a federal question was properly raised,[1] it still does not affirmatively appear that petitioner has raised a question under the Sixth Amendment in the proceedings below.

In short, the only claim that petitioner properly raised below is that the "refusal of the Board of Regents to grant a continuance (adjournment) under the circumstances violated petitioner's rights to due process."[2] And it is

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[1] *Contra, Lynch* v. *New York,* 293 U. S. 52, 54 (1934).

[2] So said the Appellate Division, Third Department, in its opinion. See Appendix A *infra.*

questionable whether or not the Appellate Division, Third Department, in passing upon this claim, considered it under the due process clause of the 14th Amendment, or under the due process clause of Article I, Section 6 of the State Constitution.

In the event this Court takes jurisdiction, the final judgment to be reviewed by this Court under 28 U. S. C., § 1257 is, of course, that of the Appellate Division, Third Department, since its judgment was the final ruling on the merits. *American Railway Express Co.* v. *Levee,* 263 U. S. 19, 20-21 (1923).

Question Presented

Assuming that the Appellate Division, Third Department, in passing upon petitioner's claim that the "refusal of the Board of Regents to grant a continuance (adjournment) under the circumstances violated petitioner's rights to due process," considered the claim under the due process clause of the 14th Amendment, the question presented for review by this Court may be stated as follows:

> Whether the Board of Regents, in refusing to grant petitioner on September 29, 1964 a fourth adjournment of the hearing in the disciplinary proceeding to revoke his license to practice medicine on the ground that his counsel was otherwise engaged in the trial of another matter, arbitrarily abused its discretion thus denying petitioner due process of law under the Fourteenth Amendment, where it appears that petitioner had already been granted three adjournments on the same ground, and that petitioner and his attorney were informed first on June 9, 1964, when the second adjournment was granted, and then on September 15, 1964, when the third adjournment was granted, that

there would be no further adjournments and that petitioner should engage other counsel if his counsel would be otherwise engaged in September.

Statement of Case

On April 17, 1964 a disciplinary proceeding, under §§ 6514 and 6515 of the Education Law of the State of New York, was instituted against petitioner. In this proceeding he was charged (1) with having been convicted of a crime in a court of competent jurisdiction within the State of New York, in that, charged with twenty-six counts of abortion and one count of attempted abortion, he entered a plea of guilty under the twenty-seventh count of the indictment (attempted abortion) to the misdemeanor of assault in the third degree; and (2) with having undertaken and engaged to perform criminal abortions, in that he performed abortions upon four named persons (RR 67-74).[3]

A hearing on the charges was scheduled to be held before a three-man Subcommittee of the Committee on Grievances on May 13, 1964. However, on May 6, 1964 Maurice Edelbaum, attorney for the petitioner, requested an adjournment of the hearing on the ground that he was away on a doctor-ordered rest and would be engaged in another trial on his return. This request was honored and the hearing was adjourned to June 9, 1964 (RR 5). On the adjourned day an associate of Mr. Edelbaum appeared before the Subcommittee and requested an adjournment "to the fall" on the ground that Mr. Edelbaum was engaged in a trial which would last through the month of June, with another to follow in July (RR 20). The motion was op-

[3] "RR " refers to the printed "Record for Review" filed by petitioner with this Court as part of the certified Record.

posed by the Assistant Attorney General assigned to the proceeding. The Chairman of the Subcommittee granted the motion for an adjournment, stating that on or about June 18 a date will be set for the early part of September and, upon the request of the Assistant Attorney General, directed that the hearing must proceed on the date to be fixed in September, and that the petitioner should engage other counsel if Mr. Edelbaum will be otherwise engaged at that time (RR 21).

The new date set for the hearing by the Subcommittee was September 15, 1964. Once again on that date an associate of Mr. Edelbaum appeared before the Subcommittee and requested an adjournment until sometime in October (RR 23). Again the basis for the request was that Mr. Edelbaum was engaged in the trial of a case with another to follow. The Assistant Attorney General objected to any adjournment beyond a week or, at the utmost, two weeks (RR 24). After some discussion off the record the Chairman granted a two-week adjournment until September 29, 1964. In so doing the Chairman, after stating that the Committee felt that all reasonable extensions had been granted in this case, made a second repetitive direction that the hearing be held on a day certain (now September 29) whether or not Mr. Edelbaum represents the petitioner (RR 24-25).

On September 29, 1964 an associate of Mr. Edelbaum appeared before the Subcommittee with the petitioner and read into the record an affidavit by Mr. Edelbaum (RR 28, 77-78). This affidavit stated that he was engaged in a murder trial, which would take approximately two weeks to conclude, and requested an adjournment until November at which time he would, without fail, appear and represent the petitioner before the Subcommittee. The associate informed the Subcommittee that since the affidavit

had been drafted, Mr. Edelbaum had informed him that he would make himself available to the Subcommittee with the petitioner on October 22, 1964, and requested an adjournment until that time. The associate further informed the Subcommittee that Mr. Edelbaum had spoken with the petitioner after the last adjournment, explained what had happened and suggested that he might wish to obtain another attorney, but that the petitioner had refused to do so, insisting that Mr. Edelbaum represent him (RR 28). The Assistant Attorney General opposed the application for another adjournment on the grounds that there had already been a number of delays; that the petitioner and his attorney had been informed first on June 9 and then on September 15 that no further adjournments would be granted, and that petitioner should obtain other counsel if Mr. Edelbaum would be otherwise engaged at that time; and that the witnesses for the Education Department were present and that it would be very difficult, if not impossible, to obtain their attendance at any future occasion (RR 29-30). The Chairman of the Subcommittee denied the adjournment as to the witnesses present, but Mr. Edelbaum's associate was advised that the witnesses on behalf of the petitioner might be produced at a later date. This offer was declined and, after some further discussion, the associate and the petitioner left the hearing room and the hearing proceeded without them (RR 32-34).

After the hearing was completed, the Subcommittee of the Committee on Grievances, in its report of October 8, 1964 to the full Committee, found that the charges had been sustained and recommended that petitioner's license to practice medicine be revoked on each of the specifications contained in the charges (RR 79-86). The full Committee on Grievances unanimously adopted the findings, determination and recommendation of its Subcommittee (RR

87-89). Thereafter the Regents Committee on Discipline, in its report to the Board of Regents of the University of the State of New York, following a hearing at which the petitioner and an associate of Mr. Edelbaum's appeared to request a remand of the proceedings, unanimously sustained the prior findings, determination and recommendation (RR 90-94). In denying the request for a remand, the Committee said (RR 93-94):

> "The Subcommittee adjourned the hearing for more than five months to accommodate respondent's attorney. Respondent [petitioner herein] and the attorney from Mr. Edelbaum's office were clearly informed that no further adjournments would be granted and that they would have to be ready to proceed on September 29th. Respondent's right to counsel does not mean that he can indefinitely delay a proceeding by insisting that only one lawyer represents him and because that lawyer is always engaged in trial or about to be so engaged, that he is entitled to further postponements. Respondent and his attorney were given every reasonable consideration. Respondent chose not to participate in the hearing, and he is bound by that decision. We are of the opinion the Committee below did not abuse their discretion in refusing a further adjournment of the proceedings."

The Board of Regents accepted the determination of the Medical Committee on Grievances and revoked petitioner's license to practice medicine (RR 95).

Petitioner sought a review of this determination, under § 6515 of the Education Law and Article 78 of the New York Civil Practice Law and Rules, in the Supreme Court, Appellate Division, Third Department (RR 3-9). In a *per curiam* opinion, the Court unanimously confirmed the determination of the Board of Regents. With respect to petitioner's contention that the "refusal of the Board of Regents to grant a continuance (adjournment) under the circumstances violated petitioner's rights to due process",

the Appellate Division reviewed the history of the hearing and its adjournments, noted that the petitioner had declined an offer on September 29, 1964 to produce his witnesses at a later date, and said in conclusion that "comment, in light of the circumstances, would seem unnecessary" (Appendix A hereto, *infra*).

An application for leave to appeal to the New York Court of Appeals was denied, without opinion, by the Court of Appeals on June 10, 1965 (Appendix B hereto), and the order of revocation of petitioner's license has gone into effect.

ARGUMENT

There is no substantial or important federal question of law to be reviewed by this Court. The decision of the Court below that petitioner has not been denied due process is clearly correct.

It is submitted that when the due process issue here presented is considered in light of the concrete facts and circumstances under which it arose, it is obvious that there is no substantial federal question presented for review by this Court. The Appellate Division, Third Department, implied as much, and correctly so, when it said in its decision, after reviewing the history of the hearing and its adjournments and noting that petitioner had declined an offer on September 29, 1964 to produce his witnesses at a later date, that comment as to petitioner's contention that refusal to grant a fourth adjournment deprived him of due process, "in light of the circumstances, would seem unnecessary" (Appendix A hereto, *infra*).

Petitioner assumes that he has raised a substantial federal question and urges that the Court take jurisdic-

tion of this case by reason of the importance and novelty of the due process issue presented. However, the question and its answer is obviously not of importance to the general public, as distinguished from the petitioner herein, since the question and its answer, resting upon its own peculiar facts, will affect no one other than the instant petitioner.

Finally, it is submitted that the decision of the Appellate Division, Third Department, is clearly correct. It is well settled that the matter of granting a continuance or adjournment before an administrative agency rests in the sound discretion of the chairman or presiding officer of the agency, and reviewing courts will not interfere with the exercise of that discretion except upon a clear showing of abuse.[4] In this respect the rule is the same as that which applies in judicial proceedings, criminal as well as civil. *Isaacs* v. *United States,* 159 U. S. 487, 489 (1895); *Franklin* v. *South Carolina,* 218 U. S. 161, 168 (1910); *Avery* v. *Alabama,* 308 U. S. 444, 446 (1940); *Ungar* v. *Sarafite,* 376 U. S. 575, 589 (1964); *People* v. *Oskroba,* 305 N. Y. 113, 117, 111 N. E. 2d 235, 236 (1953); *Citizens Trust Co.* v. *Prescott & Son, Inc.,* 221 App. Div. 426, 432, 223 N. Y. Supp. 191, 197 (1927). And whether the denial of a continuance is so arbitrary as to violate due process depends upon the circumstances present in every case. *Ungar* v. *Sarafite, supra.*

Here, as detailed at pp. 4-6 *supra,* the petitioner was granted three adjournments of the hearing in the disciplinary proceeding to revoke his license to practice medicine on the ground that his counsel was otherwise engaged. When petitioner requested a fourth adjournment for the

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[4] See 2 Am. Jur. 2d, *Administrative Law,* § 426; 1 Davis, *Administrative Law,* § 8.08, at 546-47.

same reason on September 29, 1964, the Chairman of the Subcommittee denied the request as to the witnesses present, but advised that the witnesses on behalf of the petitioner might be produced at a later time. However, this offer was declined by the petitioner.

Under these circumstances, it is manifestly apparent that the Chairman of the Subcommittee did not abuse his discretion when he denied petitioner's application for a fourth adjournment on September 29, 1964. Thus petitioner's contention that he has been denied due process is completely devoid of merit and the decision of the Appellate Division, which confirmed the determination of the Board of Regents revoking petitioner's license, is clearly correct.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated: October 18, 1965.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Respondent

RUTH KESSLER TOCH
Assistant Solicitor General

ROBERT L. HARRISON
Assistant Attorney General

of Counsel

APPENDICES

Appendix A

OPINION OF APPELLATE DIVISION CONFIRMING DETERMINATION OF BOARD OF REGENTS

SUPREME COURT

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

May 6, 1965.

In the Matter
of
FRANK CIOFALO,

Petitioner,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondent.

Per Curiam. Proceeding under CPLR article 78 to review a determination of the Board of Regents which revoked the petitioner's license to practice medicine pursuant to the permissive provisions of subdivision 2 of section 6514 of the Education Law. The charges contain two specifications which charge in substance: (1) that the petitioner has been convicted of a crime in a court of competent jurisdiction within the meaning of section 6514 (subd. 2, par. [b]) of the Education Law in that, charged with twenty-six counts of abortion as a felony and one count of attempted abortion, he entered a plea of guilty under the twenty-seventh count of the indictment (attempted abortion) to the misdemeanor of assault in the

third degree, and (2) that the petitioner undertook and engaged to perform criminal abortions within the purview and meaning of section 6514 (subd. 2, par. [e]) of the Education Law in that the petitioner performed abortions upon four named persons. As to the first specification, the conviction, which is undisputed, must be regarded as an admission of some unlawful physical or medical procedure in relation to a pregnant woman named in the indictment, which was received in evidence at the hearing (*Matter of Jones* v. *Allen,* 4 A. D. 2d 994). As to the second specification, there was direct and substantial evidence of abortions performed upon the four persons named. Giving due consideration to the prior reputation of the petitioner, the measure of discipline imposed is not so disproportionate to the offenses established as to warrant the substitution of our judgment for that of the administrative agency (*cf. Matter of Stolz* v. *Board of Regents,* 4 A. D. 2d 361; *Matter of Leavitt* v. *Board of Regents,* 9 A. D. 2d 987) and we do not find a basis in the record for determining that the discipline should be different from that which the Regents have imposed on recommendation of the Medical Committee on Grievances.

The petitioner contends also that the "refusal of the Board of Regents to grant a continuance (adjournment) under the circumstances violated petitioner's rights to due process." The hearing originally was scheduled for May 13, 1964. The petitioner requested and obtained an adjournment to June 9, 1964. On June 9, 1964, the petitioner requested an adjournment "to the fall". The request was granted and thereafter the petitioner was informed through his counsel that the new date for the hearing was September 15, 1964. However, on June 9 the Chairman of the

Appendix A

Subcommittee on Grievances directed that the hearing would be required to proceed on the date to be fixed in September and that the petitioner should engage other counsel if his counsel was otherwise engaged at that time. On September 15 a further adjournment was requested. The Chairman of the Subcommittee postponed the hearing to September 29, 1964, but made a further repetitive direction that the hearing be held on that date regardless of the petitioner's position or his "attorney's position" and added: "We are going to have the hearing on the 29th regardless of whether or not you people represent the Respondent [the instant petitioner]." On September 29 the petitioner's attorney through an associate presented an affidavit of engagement and asked for a further adjournment. The adjournment was denied as to the witnesses present but the associate counsel was advised that the witnesses on behalf of the petitioner might be produced at a later date. This offer was declined. As to the petitioner's contention that refusal to grant a fourth adjournment deprived him of due process, comment, in the light of the circumstances, would seem unnecessary.

Determination confirmed, and petition dismissed, without costs.

GIBSON, P. J., HERLIHY, REYNOLDS, AULISI and HAMM, JJ., concur.

Appendix B

ORDER OF THE NEW YORK COURT OF APPEALS DENYING LEAVE TO APPEAL

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Tenth day of June A. D. 1965.

Present, Hon. CHARLES S. DESMOND,
Chief Judge, presiding.

Mo. No. 561

In the Matter of the Application
of
FRANK CIOFALO, M. D.,
Appellant,

For an Order &c.,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,
Respondent.

A motion for leave to appeal to the Court of Appeals and for a stay in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Appendix B

ORDERED, that the said motion be and the same hereby is denied.

A COPY

GEARON KIMBALL
Deputy Clerk